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No. 07-1485

Supreme Court, U.S.
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In The
Supreme Court of the United States

WARDEN HUGH SMITH and
SANCHE MARTIN,

Petitioners,

v.

JAMIL AL-AMIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Whether the First Amendment requires special handling of prisoners' legal mail is an issue that has badly divided the federal courts of appeals. This issue has percolated through the courts ever since this Court remarked in *Wolff v. McDonnell,* 418 U.S. 539 (1974), that by opening legal mail in the presence of a prisoner prison officials were doing "all, and perhaps even more than the Constitution requires," *id.* at 577; and even the court below acknowledged that those courts have reached differing results. Pet. App. 21-27. Respondent's attempts to deny or minimize this division are unconvincing.

Respondent does not dispute that the questions presented by this petition, which affect the day-to-day administration of prisons throughout the country, are important. Nor does he deny that the holding of the court below created a new, free-standing constitutional right for prisoners, separate and distinct from the Sixth Amendment right to counsel and the right to access the courts, and this free-standing right in turn allows inmates to maneuver around the actual-injury requirement established by *Lewis v. Casey,* 518 U.S. 343 (1996). For all these reasons, the time is now ripe for the Court to consider this issue, which the Court has not reviewed since it decided *Wolff* over thirty years ago.

Despite what Respondent says, the facts of this case are not an obstacle to meaningful review of the

issue presented: whether opening, but not reading, legal mail outside an inmate's presence violates the inmate's First Amendment rights. Even if unresolved issues were to remain after this Court's review, that is neither unusual, nor does it affect the import or scope of the issue presented. To the contrary, the clarity of both the relevant facts and the holding below make this an ideal case to decide the issue presented.

I. DESPITE RESPONDENT'S ATTEMPT TO DENY IT, THE SPLIT AMONG THE CIRCUITS IS REAL AND PRESSING.

Respondent says that the Fifth Circuit's decision in *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993) and the Seventh Circuit's decision in *Lewis v. Cook County*, 6 Fed. Appx. 428 (7th Cir. 2001) do not conflict with the Eleventh Circuit's decision in this case, or with those of the other circuits with which the Eleventh Circuit agreed. Respondent's argument simply cannot be squared with the plain words of the decisions themselves. In *Brewer* the Fifth Circuit could hardly have been clearer:

> [W]e thus acknowledge that what we once recognized in [*Taylor v.*] *Sterrett* [532 F.2d 462 (5th Cir. 1976)] as being "compelled" by prisoners' constitutional rights – i.e., that a prisoner's incoming legal mail be opened and inspected only in the prisoner's presence, is no longer the case. . . . The Appellants, therefore, have not stated a cognizable

> constitutional claim *either* for a denial of access to the courts *or* for a denial of their right to free speech by alleging that their incoming legal mail was opened and inspected for contraband outside their presence.

Brewer, 3 F.3d at 825 (internal citations omitted, emphases added).

For its part, the Eleventh Circuit likewise discussed this issue largely in terms of the continuing validity of *Taylor v. Sterrett*, and of the similar holding in *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978), and made no attempt to conceal its fundamental disagreement with the Fifth Circuit. "Subsequent to *Turner*, the Fifth Circuit reconsidered *Taylor* and *Guajardo* and rejected their holdings. . . . [W]e conclude that our well-established law in *Taylor* and *Guajardo* . . . is not changed by *Turner* and remains valid. . . ." Pet. App. 27, 28.

Admittedly, Brewer did not dispute that prison officials had a legitimate interest in opening legal mail, but both Brewer and Al-Amin buttress their constitutional argument by showing that the opening of legal mail outside the presence of the inmate violated established prison policy. The difference in the holdings is that the Fifth Circuit did not treat this policy violation as proof of a lack of legitimate penological interest, while the court below found just that. In other words, in the Fifth Circuit there is no valid First Amendment free speech claim for opening an inmate's legal mail outside of his presence, but in the Eleventh Circuit there is. The distinction

proffered by Respondent has no bearing on the ruling of the Fifth Circuit and thus has no impact on the existence of a clear and defined split in the circuit courts.

The circuit and district courts in the Seventh Circuit also decline to afford "special" constitutional protection to legal mail. *See Lewis v. Cook County Bd. of Commissioners*, 6 Fed. Appx. 428, 430 (no basis for a free speech claim for opening of inmate legal mail); *Vasquez v. Raemisch*, 480 F.Supp.2d 1120, 1138-1141 (W.D. Wis. 2007) (same). Respondent attempts to minimize the importance of these cases by relying on *Kaufman v. McCoughtry*, 419 F.3d 678, 686 (7th Cir. 2005) and *Antonelli v. Sheahan*, 81 F.3d 1422 (7th Cir. 1995), but his reliance is misplaced First, *Kaufman* does not hold that the opening of legal mail is a *free speech* violation. Rather, *Kaufman* holds only that the opening of legal mail may state a "potential" *access to courts* claim, *if* the requisite actual injury is shown. *See Kaufman*, 419 F.3d at 685-686. That, of course, is a far cry from what the Eleventh Circuit held here. And *Antonelli v. Sheahan*, has little to do with opening legal mail. Rather, as noted by the court in *Lewis v. Cook County*, *Antonelli* holds only that a potential First Amendment claim exists where it is alleged that legal mail "was delayed for an inordinate amount of time and sometimes stolen." *Lewis v. Cook County*, 6 Fed. Appx. at 430 (internal quotes

omitted).[1] Thus, despite respondent's arguments, the disagreement among the circuits is real and the Court should resolve it.

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE TO RESOLVE THE QUESTIONS PRESENTED.

Respondent contends that this case presents a poor vehicle for review first because there is an open question whether prison officials read his mail and secondly because prison officials violated institutional policy when they opened the legal mail outside of his presence. Both arguments lack merit. Al-Amin argued below as he does now, that the opening of his legal mail chilled his speech because the only way to guarantee that the mail would not be read would be to open it in his presence. *Id.* at 33. Presumably, if Respondent's speech would be "chilled" by the opening of legal mail, it would also be chilled by the reading of legal mail. The question is, whether the "chilling" effect gives rise to a constitutional claim separate and apart from any claim under the Sixth Amendment or one for denial of access-to-courts. It is indisputable that the court below squarely decided that the opening of an inmate's legal mail constitutes a violation of the First Amendment separate and apart from an access-to-courts claim. The argument

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[1] It is important to note that *Antonelli* was published prior to this Court's decision in *Lewis v. Casey*.

that there may be issues remaining in the case after reversal has no bearing on the issue to be decided.

Next, Al-Amin contends that this case presents a poor vehicle for review because prison officials violated a valid institutional policy in opening legal mail, so only the propriety of the officials' individual actions, rather than the policy itself, is at issue. This distinction actually supports the need for certiorari in this case. The prison system's adoption of prophylactic measures to protect against intrusion on inmates' existing Sixth Amendment and access-to-court rights does not elevate those measures to constitutional stature. The failure to comply with prison policy does not amount to a constitutional violation. *Davis v. Scherer*, 468 U.S. 183 (1984). Non-compliance with stated policy cannot be dispositive under *Turner* and should not preclude the Court from granting certiorari.

Lastly, Respondent's attempt to defer ruling on this issue until *Fontroy v. Savage*, 485 F.Supp. 595 (E.D. Pa. 2007), winds its way through the Third Circuit fails to acknowledge that the Third Circuit has already determined that "legal" mail is entitled to special constitutional protection. *See Jones v. Brown*, 461 F.3d 353 (3d Cir. 2006). *Fontroy* analyzes the scope, not the existence of that protection. *Fontroy* is therefore unlikely to shed much light on the issue which this case squarely presents.

III. AN INTERLOCUTORY REVIEW PRESENTS AN APPROPRIATE VEHICLE FOR THE DETERMINATION OF QUALIFIED IMMUNITY.

Respondent argues that review is not proper on the denial of qualified immunity because there is no split among the circuits on this issue. But, this Court's review of the denial of qualified immunity does not depend on a split among the circuits. This Court has repeatedly considered interlocutory appeals from the denial of qualified immunity. *Scott v. Harris*, ___ U.S. ___, 127 S. Ct. 1769 (2007); *Hartman v. Moore*, 547 U.S. 250 (2006); *Hope v. Pelzer*, 536 U.S. 730 (2002); *Saucier v. Katz*, 533 U.S. 194 (2001). Qualified immunity is "immunity from suit" and is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). An order denying qualified immunity is immediately appealable, otherwise, the order would be "effectively unreviewable." *Id.* at 527.

Respondent next asserts that *Casey* was an access to courts case, and thus is not relevant to the analysis of whether the law was clearly established for purposes of the First Amendment Free Speech Clause. If such were the case, then neither *Taylor* nor *Guajardo*, also access-to-courts cases, would be relevant to the qualified immunity analysis. But these cases are relevant to the inquiry, insofar as the Fifth Circuit's rejection of these decisions provided prison officials in the Eleventh Circuit with a reasonable belief that neither case was good law after *Brewer*. Moreover, the Eleventh Circuit expressly

relied on access-to-courts cases in determining that officials were on notice that their conduct amounted to a constitutional violation. Pet. App. p. 39. It is this reliance that warrants review.

The qualified immunity analysis looks to the objective reasonableness of an official's conduct. *Hope*, 536 U.S. at 747. In applying the objective test of what a reasonable official would understand, the significance of federal judicial precedence is a part of the Judiciary's structure. *Id.* Thus, the issue is whether a reasonable prison official would have believed that *Brewer* altered the viability of *Taylor* and *Guajardo* in light of the intervening Supreme Court case of *Casey*.

Moreover, the circuitous nature of Respondent's argument ignores the distinction between First Amendment access-to-courts claims and First Amendment free speech claims. The qualified immunity inquiry must be undertaken in light of the specific context of the case at hand, not as a broad general proposition. *Saucier*, 533 U.S. at 201. The contours of the right must be sufficiently clear such that a reasonable official has fair notice that his actions violate that right. *Id.* at 201-202. That notice is simply not present here. After *Casey*, reasonable officials could not have been expected to know that conduct that did not violate inmates' rights to access-to-courts could still violate inmates' First Amendment free speech rights. Thus this case is properly poised for review as an interlocutory appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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